IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 892

BLACK UNITY LEAGUE OF KENTUCKY, LOUISVILLE PEACE COUNCIL, SOUTHERN CONFERENCE EDUCATIONAL FUND, SOUTHERN SEMINARY STUDENTS AFFILIATED WITH THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, STUDENT NON-VIOLENT COORDINATING COMMITTEE, WEST END COMMUNITY COUNCIL, WHITE EMERGENCY SUPPORT TEAM - - - - - - - - - *Appellants*

Vs.

STATE SENATOR SCOTT MILLER, JR., Chairman and Member of Kentucky Un-American Activities Committee, STATE SENATOR CARL HADDEN, STATE SENATOR CLIFFORD LATTA, STATE SENATOR CHARLES UPTON, STATE SENATOR LAWRENCE W. WETHERBY, STATE REPRESENTATIVE LLOYD CLAPP, STATE REPRESENTATIVE HAROLD DEMARCUS, STATE REPRESENTATIVE THERON KESSINGER, STATE REPRESENTATIVE GEORGE MASSEY, and STATE REPRESENTATIVE FRED MORGAN, Members of Kentucky Un-American Activities Committee - - - - - - - - - - - *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, LOUISVILLE DIVISION

MOTION TO AFFIRM

Come appellants and move the Court to affirm the judgment of the U. S. District Court for the Western

District of Kentucky on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

The Legislature of Kentucky at its 1968 session adopted a resolution creating a committee denominated as a "Joint Legislative Committee on Un-American Activities". The Resolution is correctly set forth in Appendix C of appellants' printed statement. Subsequently, the Governor of the Commonwealth of Kentucky appointed five members of the Kentucky House of Representatives and five members of the Kentucky Senate to be members of the Committee as required by the Resolution. These ten legislator-members of the Committee were made the defendants in this action. The Committee subsequently adopted a Resolution, (Appendix D, Appellants' Statement), and Rules of Procedure (Appendix E, Appellants' Statement). The complaint alleges that the Commonwealth Attorney of the 30th Judicial District has delivered to the Committee "information" concerning the plaintiffs (appellants) and that the Committee "intends imminently" to investigate the plaintiffs. In support of this allegation a clipping from a Louisville, Kentucky newspaper is attached as an exhibit to the complaint, (Appendix F, Appellants' Statement). The newspaper article reports a request by the Jefferson County Grand Jury to the Kentucky Un-American Activities Committee to investigate certain disorders which had occurred in the city of Louisville in May, 1968. The Grand Jury apparently did not name any particular organization or group, but the article does

report a statement of the Commonwealth Attorney that he would turn over to the Committee information on several organizations, some of which are plaintiffs in this action. One other circumstance is indicated by the inclusion of a letter printed as an appendix to appellants' statement. The letter is reproduced as Appendix G. It purports to be a letter from the Counsel and Director of the Committee addressed to Mr. Carl Braden, a person not a party to the action, informing him that three identified witnesses had mentioned his presence at several meetings in Louisville during the month of May, 1968, and informing him of his right to appear before the Committee if he so choose. This letter is dated November 14, 1968, and since the notice of appeal was filed on November 4, 1968, it is obviously not a proper part of the record on appeal.

Our purpose in the above outline is to indicate that the Kentucky Committee has not initiated any investigation which involves these plaintiffs or any other organization with similar alleged aims and purposes. Since the record clearly shows that the Committee has not in fact taken the slightest action to "deter, harass and intimidate" the plaintiffs, then their complaint must stand or fall on whether the Resolution of the Kentucky Legislature should be declared void on its face and its implementation enjoined to prevent irreparable injury to these particular plaintiffs.

ACTION OF THE DISTRICT COURT

The District Judge apparently certified the necessity for convening a three judge court to the Chief Judge of the U. S. Court of Appeals for the Sixth Circuit, based on the allegations of the complaint. The three judge court was constituted. Subsequently the

defendants filed a Motion to Dismiss on the grounds that the court lacked jurisdiction over the subject matter and that the complaint failed to state a claim. The defendants filed with their motion a memorandum of authorities which supported their motion. The plaintiffs made no response to the motion and did not file any memorandum of authorities or statement in opposition to the motion. The District Court pointed out in its second order that the rules of the U. S. District Court for the Western District of Kentucky require that a response to motions be filed not later than five days from receipt of the notice of motion. The motion and notice was filed on July 25, 1968. On August 26, 1968, the defendants filed a written motion to assign the pending motion to dismiss for hearing. On September 9, 1968, the District Court, by an order signed by the three designated judges, sustained the defendants' motion and dismissed the complaint.

Nineteen days after the entry of the final order dismissing the complaint the plaintiffs filed a motion "for Emergency Relief". The basis of the motion was the failure of the District Court to grant an oral hearing prior to ruling on the motion to dismiss. The District Court overruled the "emergency" motion pointing out that the plaintiffs had not responded to the defendants' memorandum in support of the motion to dismiss, and had not requested an oral hearing. It is apparent, at least to counsel, that the Court had reviewed the pleadings, and the authorities cited by defendants, and concluded that an oral hearing, previously requested by defendants, would not alter its determination to sustain the motion to dismiss.

THE QUESTION PRESENTED IS NOT SUBSTANTIAL BECAUSE PREVIOUS DECISIONS OF THIS COURT UPHOLD THE RIGHT OF A STATE TO INVESTIGATE IN THE AREA COVERED BY THE KENTUCKY RESOLUTION.

As pointed out in our statement the appellants' burden is to show that the Resolution is void on its face. Under previous cases decided by this Court the question of the right of a state to provide for investigation in the area described in the Kentucky Resolution has been upheld. For this reason the attack on the Kentucky Resolution does not present a question of substance.

This Court in the case of *Uphaus vs. Wyman, 360 U. S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090,* decided that the State of New Hampshire had a legitimate legislative interest in providing for investigations to determine the presence of subversive persons in the State. A subversive person was defined, by law, as a person who attempts to act, or advocates the commission of an act, intended to overthrow the government of the United States, the State of New Hampshire, or any political subdivision thereof, by force or violence. This investigatory authority is identical to the authority conferred on the Kentucky Committee by Section One of the Resolution. This Court not only sustained the State of New Hampshire's right to investigate in this area but specifically refused to proscribe the right because the Federal Government had by the Smith Act prohibited the advocacy of the overthrow of the Government of the United States by force and violence. It is our contention that Uphaus is such a conclusive answer to appellants' claim that the question presented is not of sufficient substance to justify further argument.

NO PERSON IS SUBJECTED TO HARASSMENT BY CRIMINAL PROSECUTION BY VIRTUE OF THE KENTUCKY RESOLUTION.

The appellants place their main reliance on the case of *Dombrowski vs. Pfister, 380 U. S. 479, 14 L. Ed. (2d) 22, 85 S. Ct. 1116 (1965).* In that case the authorities of Louisiana engaged in a long history of harassment of the Complainant, and criminal prosecutions were pending against him under the authority of a criminal statute which the Court held was void on its face. Under these concrete circumstances the Supreme Court directed the District Court to enjoin the state officials from further prosecution under the void statute. In *Dubois Clubs of America vs. Clark, 389 U.S. 309, 19 L. Ed. (2d) 546, 88 S. Ct. 450,* the Attorney General was in the process of a proceeding to require the complaining organization to register as a Communist-front organization. Prior to the hearing, required by law, the organization sought an injunction against any further action by the Attorney General. The organization placed its main reliance on Dombrowski vs. Pfister, supra; the Supreme Court denied relief and distinguished Dombrowski in the following language:

> In this case, the complaint and the affidavits constitute no more than conclusory allegations that the purpose of the threatened enforcement of the Act was to "harass" appellants and that the harassment was the intended result of the Attorney General's announcement that he had filed a petition with the SACB. Further, appellants are not being forced to assert their claims in a criminal prosecution.

The Dubois case furnishes a complete answer to whatever authority Dombrowski affords the appel-

lants in this case. The Dubois Club had been officially cited in a proceeding whose objective was to publicly denominate it as a Communist-front organization. These appellants have not been disturbed in any way by the Resolution or by any action taken under the authority of the Resolution, furthermore these appellants are "not being forced to assert their claims in a criminal prosecution".

THE DOCTRINE OF ABSTENTION SHOULD BE INVOKED.

The District Court in its memorandum opinion sustaining the motion to dismiss relied heavily on the doctrine of abstention as applied in the case of *Harrison vs. N.A.A.C.P., 360 U.S. 167.* There is sufficient ground to believe that the Courts of Kentucky will confine the authority granted to the Committee to areas and situations which would constitute completely permissible investigations from any and all constitutional viewpoints.

CONCLUSION

For the reasons aforesaid, it is submitted that the Court should sustain the appellees' motion to affirm.

Respectfully submitted,

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